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Bell: 3 things to know about the ethics of interviewing witnesses

James Bell January 14, 2015

It's January and it's time to put away the holiday decorations and get back to work. January brings frigid temperatures, snow and icy roads. In other words, it is a perfect time for you to knock on doors and conduct a field investigation. But before you put your coat on and head out to find that needle-in-a-haystack witness who will save your case, remember that there are ethical rules regarding how you deal with witnesses. Here are three things to know about interviewing witnesses.

1. You are not James Bond; make certain the witness understands your role

While it would be fun to play the role of a secret agent and go undercover, the Indiana Rules of Professional Conduct kind of frown on that. Rule 4.3 states that "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." If the witness appears to misunderstand your role, Rule 4.3 requires that you "correct the misunderstanding." Therefore, you need to make sure that the witness understands that you're acting in your role as an attorney and that you are not the witness's lawyer.

What if the witness appears nervous and asks you, "What should I do?" If there is a reasonable possibility that the interests of the witness may be in conflict with the interests of your client, Rule 4.3 only permits you to advise the witness to secure counsel. Again, the fact that you are an attorney working on behalf of a client must be explicit.

2. If the witness is represented, the witness can't grant permission to the interview

Most attorneys know that, under Rule 4.2 of the Indiana Rules of Professional Conduct, "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter." However, there seems to be some confusion as to whether the represented witness can unilaterally agree to an interview.

So, let's say you are standing on a porch in the midst of a frozen Indiana day and the witness you have been looking for says, "It's my life! I don't want my lawyer. I want to help you. Let's talk now!" What do you do? You have a client to represent, so obviously, you will want to get this helpful information while the getting is good. And besides, the witness "waived" his right to counsel. That sort of thing happens all the time during police interviews in jail cells. It's the witness's call. Right?

Well, actually, it is not the witness's call. Rule 4.2 "applies even though the represented person initiates

or consents to the communication." Ind. Prof. Cond. R. 4.2 cmt. 3. So, while you stand shivering on the porch with the eager witness, you better pick up the phone and contact the witness's lawyer before your proceed any further.

3. Protect yourself

Witnesses can do crazy things. Since the beginning of the legal profession, witnesses have been known to tell the truth, tell lies, tell inconsistent stories, change their entire stories, change part of their stories, become confused, and become intimidated for good and no good reasons. If the witness says something you like and you want to present the testimony at trial, your opposing counsel will want to test that witness. Therefore, what you said or didn't say to that witness may become fair game.

You went to law school to be the lawyer on a case, not to be part of the case. So protect yourself.

When you go to meet a witness, bring another witness. This ensures that there will be evidence of what took place at the interview. If no one can attend the interview with you, give consideration to whether you want to record the conversation as well. Present your business card to the witness so there is no confusion that you are an attorney. If you like, write on the card who you represent. And finally, while you will always be looking for the truth, it will not hurt for you to explicitly ask the witness to tell you the truth. I have seen lawyers rehabilitate witnesses when it was recounted that "the lawyer asked me to tell the truth."•

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Bell/Whelan: 3 things to know about reporting ethics violations

James Bell , Jessica Whelan November 4, 2015

If you're like us, you're a lawyer who enjoys giving advice to others. As attorneys who represent other attorneys in disciplinary matters, we often receive requests to give ethics advice to lawyers. As luck would have it, we like lawyers and generally enjoy giving advice to lawyers when we can.

One request that we don't particularly like, however, is when we are asked to advise an attorney as to whether he or she "should turn in" another attorney to the Disciplinary Commission. Responding to these requests can be problematic for many reasons. Luckily, the duty to report (and most of what you need to know about it) is spelled out in the Indiana Rules of Professional Conduct. Here are three things you should know about an attorney's duty to report an ethics violation by another lawyer.

1. Not all violations of the Rules of Professional Conduct need to be reported

Rule 8.3(a) of the Indiana Rules of Professional Conduct states that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

In examining Rule 8.3, it is clear that the lawyer must "know" of the other attorney's violation. Rule 1.0 (f) states that "'knows' denotes actual knowledge of the fact in question." Although it goes on to say that a "person's knowledge may be inferred from circumstances," it is clear that an attorney is not required to report anything unless they have "actual knowledge" of the violation.

Furthermore, the word "substantial" is placed in the rule for a reason. Our rules did not intend for every missed phone call to be reported as a lack of diligence or a failure to communicate. In fact, as outlined in the rule, if the alleged misconduct of the other attorney does not cause you to question the lawyer's honesty, trustworthiness or fitness as a lawyer, you can report the violation, but you are not required to do so.

Even if the attorney has actual knowledge of another's misconduct that is covered by Rule 8.3, confidentiality trumps the mandatory reporting provision. Specifically, Rule 8.3(c) of the Indiana Rules of Professional Conduct states that the rule "does not require reporting of a violation or disclosure of

information if such action would involve disclosure of information that is otherwise protected by Rule 1.6."

Please keep in mind that Rule 1.6 is far broader than the attorney-client privilege. Rule 1.6 states that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent," or there is another exception. Therefore, if you learn of an attorney's misconduct through the representation of a client and the client will not consent to your report to the Disciplinary Commission and no other exception to Rule 1.6 applies, you are required to forever hold your peace.

2. You are required to self-report convictions for crimes

Rule 8.3 is written in terms of "another lawyer." We define "another lawyer" as "any lawyer but me." That leads to the question of whether there is a time when an attorney is required to tell on "me?"

In Indiana, an attorney is required to self-report a criminal conviction. According to the Indiana Admission & Discipline Rule 23, § 11.1(a)(2), "[a]n attorney licensed to practice law in the state of Indiana who is found guilty of a crime in any state or of a crime under the laws of the United States shall, within 10 days after such finding of guilty, transmit a certified copy of the finding of guilt to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission." Judges who are aware of an attorney's criminal conviction have a similar duty. See Admis. Disc. R. 23, § 11.1(a)(1).

3. Do not threaten to report an ethics violation to obtain an advantage in litigation

If you know that another attorney has committed an act of misconduct that would trigger a mandatory report, then follow the rule and report the attorney. Do not seek to report the attorney for your own personal gain – it could result in disciplinary sanctions.

For example, in the *Matter of Lehman*, 861 N.E.2d 708, 709 (Ind. 2007), the respondent filed an emergency request for a continuance of trial. The respondent "called opposing counsel and told him that his clients wanted to report opposing counsel for unethical conduct, but if opposing counsel agreed to the continuance, respondent thought he could dissuade his clients." The Indiana Supreme Court found that the respondent violated Rule 8.4(d) of the Indiana Rules of Professional Conduct, which prohibits conduct "prejudicial to the administration of justice, by communicating to opposing counsel a willingness to attempt to dissuade his clients from filing a complaint against opposing counsel as a *quid pro quo* for opposing counsel's agreement to a continuance of the trial."

Lehman and other cases demonstrate that a threat of a report to the Disciplinary Commission should not be used as a weapon in litigation. The disciplinary process serves an important purpose in regulating the legal profession. Trying to use the disciplinary process for self-serving purposes, such as to get an advantage in a case, is prohibited.•

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Bell/Gaerte: 3 things to know about confidentiality

James Bell , K. Michael Gaerte December 18, 2013

Over the past several years, attorneys and their staff have gained access to the world of social media. Through social media, those who work in the legal profession are able to communicate quickly and easily to a large audience. However, easy access to social media should be accompanied by ethical caution. While social media has not mandated the creation of new ethical guidelines, it does make it easier to commit an ethical foul. Of course, one of the easiest ways for lawyers and their staff to violate the Indiana Rules of Professional Conduct is by revealing too much information in social media.

With that, here are three things to know about confidentiality:

1. The duty of confidentiality is broad.

While some lawyers may equate the duty of confidentiality with the attorney-client privilege, the duty of confidentiality goes far beyond privileged communications with a client. In fact, arguably, the rule covers anything that pertains to a client's case. Rule 1.6 of the Indiana Rules of Professional Conduct states that "[a] lawyer shall not reveal information relating to representation of a client" and the Supreme Court of Indiana has noted that the confidentiality "protection provided is broad." *Matter of Anonymous*, 932 N.E.2d 671, 674 (Ind. 2010). The "confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Ind. Prof. Cond. R. 1.6, cmt. [3].

In the *Matter of Anonymous*, an attorney argued to the Supreme Court that she had not revealed confidential information due to the fact that the prospective client had disclosed the same information in question to her co-workers. However, the Supreme Court disagreed and stated that "the fact that a client may choose to confide to others information relating to a representation does not waive or negate confidentiality protections of the Rules." *Anonymous,* 932 N.E. 2d at 674.

In addition, the attorney attempted to argue that she had not revealed confidential information because that information could be discovered through a search of public records. The court again disagreed and concluded that "the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources." *Id.*

2. With regard to confidentiality, prospective clients are clients.

For purposes of confidentiality, an attorney should treat prospective clients the same as the attorney would treat plain old clients. "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation." Prof. Cond. R. 1.18(b).

This raises a question as to who is a "prospective client?" Rule 1.18 of the Indiana Rules of Professional Conduct states that a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." However, "a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of paragraph (a)." Prof. Cond. R. 1.18, cmt. [2].

Therefore, when an individual wishes to discuss the possible formation of a client-lawyer relationship, that person is a prospective client and is entitled to these discussions being kept confidential. With regard to firm websites, if clients are first communicating with you by clicking on your email address from your webpage, you should consider having appropriate disclaimers in place to dissuade those prospective clients from sharing confidential information with you until you believe an attorney-client relationship is a possibility. This practice could also help avoid issues with conflicts of interest.

3. Train staff regarding confidentiality.

Finally, we need to educate those who we supervise regarding the breadth of confidentiality. For example, Rule 5.3(a) of the Indiana Rules of Professional Conduct states that lawyers with managerial authority "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that [a non-lawyer assistant's] conduct is compatible with the professional obligations of the lawyer." A similar rule exists for lawyers who we supervise.

If a co-worker tweets, blogs or otherwise reveals information related to a case, that person's supervisor may not have violated Rule 1.6, but may have violated the rules pertaining to supervision. Therefore, you may want to consider starting off next year with a quick, but well-documented, meeting with your staff to discuss the duty of confidentiality and other ethical obligations of the firm.•

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